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No. 751

IN THE

Supreme Court of The United States

OCTOBER TERM, 1940

INDIANA UNEMPLOYMENT COMPENSATION BOARD,
Petitioner,
vs.
BENNER-CORYELL LUMBER COMPANY, INC.,
Respondent.

No. 751

Respondent's Brief in Opposition to Petition for a Writ of Certiorari

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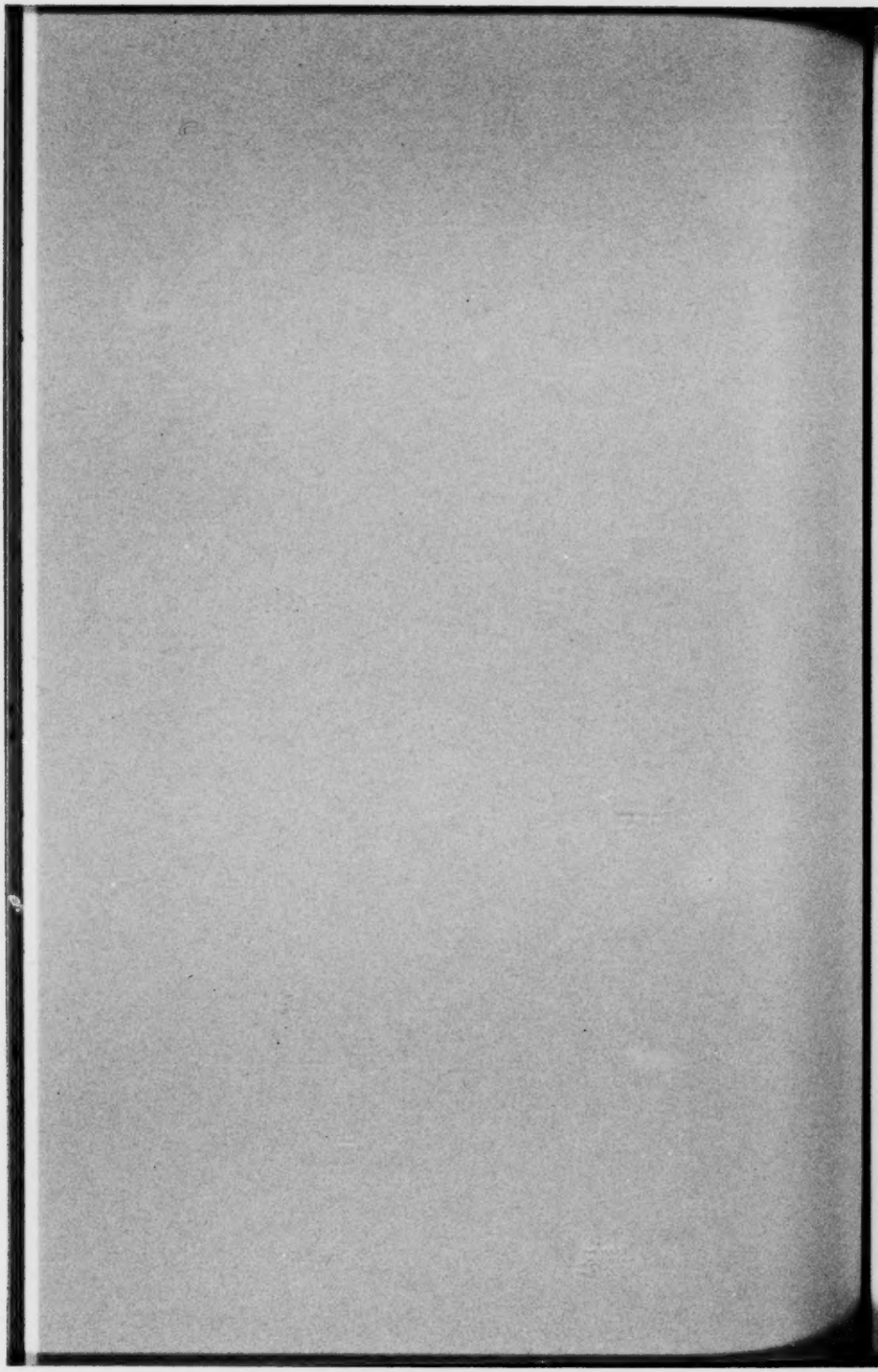

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Brief of Respondent in Opposition to Petition for a Writ of Certiorari

---

To the Honorable Charles Evans Hughes,
Chief Justice of the United States,
and Associate Justices of the Supreme
Court of the United States:

The respondent respectfully shows:

I.

Summary Statement of the Matter Involved

Respondent insists that the decision of the Indiana Supreme Court in this cause was predicated primarily upon said court's interpretation of Section 2, (g), (4), of the Indiana Unemployment Compensation Act as applied to the pertinent facts recited in said decision.

The constitutionality of said statute was referred to only incidentally in next to the last paragraph of said decision.

If it may be said that both federal and non-federal questions were decided by the Indiana Supreme Court, certiorari will not lie because,

(a) It does not appear affirmatively from the record that the decision of the federal question was necessary to a determination of the cause;

(See printed transcript of record, pp. 12 to 19, both inclusive.)

(b) The decision of the Indiana Supreme Court is an interpretation of a state statute as applied to the pertinent facts in the cause;

(See printed transcript of record, pp. 12 to 19, supra.)

(c) The federal courts will follow the decisions of state courts upon questions relating to the interpretation of state statutes.

See Argument, infra.

ARGUMENT

Point A

Respondent insists that the decision of the Indiana Supreme Court in this cause was predicated, primarily, on that court's construction and interpretation of Section 2, (g), (4), of the Indiana Unemployment Compensation Act, as applied to the facts recited by the court in its decision.

(See printed transcript of record, pp. 12 to 19, both inclusive.)

The Indiana Supreme Court stated the facts as follows:

"The appellant is an Indiana corporation, with its office and principal place of business in the town of LaFontaine, Wabash County. It is engaged in the retail lumber business and employs less than eight persons. Its capital stock is represented by 90 shares, 60 of which are owned by Bertha J. Coryell. Said Bertha J. Coryell also owns 185 out of 300 shares of the common stock of the Fairmount Lumber Company, a domestic corporation engaged in the lumber business at Fairmount, in Grant

County, and which likewise employs less than eight persons. Together, said corporations employ more than eight persons. The minority stockholders of the respective corporations are not the same persons. The state assessed unemployment compensation taxes against the appellant, which it paid under protest. It then brought this suit for a refund. The state answered, reciting the above facts; the appellant demurred to the answer; the trial court overruled the demurrer; the appellant refused to plead further; and judgment was rendered in favor of the state. The error relied on is presented by the ruling on said demurrer."

Then, among other matters, the Indiana Supreme Court stated this Respondent's position to be as follows:

"It is to be noted that no elements of fraud or intentional tax evasion are involved in this case, nor is there any showing of joint management of the two corporations or any other relationship between them beyond the fact that Bertha J. Coryell owns a controlling interest in the common stock of each. It is urged that to hold the statute valid as it is sought to be applied here, would unjustly penalize minority stockholders of corporations, who have no control over the transfer of stock not held by them, and are therefore powerless to prevent a majority of such stock from gravitating into the hands of one person who may at the same time own, or thereafter acquire, a controlling interest in another corporation, thereby subjecting, indi-

rectly, said minority holders to the burden of taxes not imposed upon corporations otherwise situated."

Thereupon, the Indiana Supreme Court said:

"The question which we are called upon to answer is therefore reduced to this: Do the owners of a majority of the stock of a corporation have such control thereof as to make their ownership or control the basis of classification for the purpose of imposing excise taxes on such corporations in the manner prescribed by the act under consideration?"

The Indiana Supreme Court then discussed certain instances wherein the ownership of corporate stock is recognized as a proper basis of classification for excise tax purposes and, after citing cases to support that proposition, the court continued as follows:

"None of the above cases considered the subject of discrimination against a corporation where the imposition of a tax was dependent upon the ownership of a mere controlling interest of its stock. The only case that we have found where the precise question here presented was before a court of last resort is Independent Gasoline Co. v. Bureau of U. Compensation (1940), ____ Ga. ____, 10 S. E. (2d) 58, 59."

Then, the Indiana Supreme Court quoted at length from Independent Gasoline Co. v. Bureau of U. Compen-

sation (1940), _____Ga. _____, 10 S. E. (2d) 58, 59, in which this court denied certiorari on November 25, 1940, _____ U. S. _____, 85 L. ed. 124.

Thereupon, the Indiana Supreme Court concluded its interpretation of said statute by holding that it was not applicable to the facts involved in this cause, and stated its reasons in support of such conclusion, as follows:

> "As has already been observed, the law regards a corporation as a distinct entity. This status is unaffected by the fact that a majority of its stock may or may not be controlled by the same interests. It may also be assumed for the present inquiry, that excise taxes of the character defined by the Unemployment Compensation Law may be imposed upon corporations; that corporations may be classified for that purpose; and that the amount of such taxes to be exacted may be determined by payroll expenditures. It is likewise true that as artificial persons, corporations must enjoy liberty of action to determine for themselves whether they will engage or continue in enterprises that would render them subject to this tax, and they should be in a position to know or ascertain whether such liability exists. Over the sale and transfer of its stock, a corporation ordinarily has no control. Transactions relating to the sale of capital issues may be negotiated privately or through independent marketing agencies, and the responsible officers of a corporation may not be advised as to the ownership of its shares until the certificates therefor are

presented for transfer. The stock of a particular corporation may be so distributed that the controlling majority thereof may change ownership at frequent intervals. In practical operation, situations may arise where the majority of the voting stock may or may not be in the hands of the same interests many times between annual meetings of the stockholders, or even between the tax paying periods. Under such circumstances, uncertainty and confusion would be inevitable and a continuity of policy impossible. For these reasons, it seems impossible to justify the interpretation sought by the state, upon the theory that the holders of a majority of the stock have control thereof because it is within their power to dictate who the directors shall be.

"The feature of the law which apparently undertakes to impose liability for these taxes on a corporation employing less than eight persons because the owner of a majority of its stock has a like interest in another corporation similarly situated, is likewise indefensible. As was pointed out in the concurring opinion of the Georgia case, from which we have quoted, this construction would permit corporations remotely located and engaged in business as dissimilar as those for which corporations may be formed, to be arbitrarily and fictitiously considered together for the purpose of imposing this tax. We do not believe that the General Assembly intended the provision of the act to be so applied, and if it did, we would be obliged to hold

it void. Legislatures have a wide latitude in setting up classifications in taxing statutes, but such classifications must always be reasonable and bear a rational relationship to the subject-matters with which they deal. Board, etc., v. Johnson (1909), 173 Ind. 76, 89 N. E. 590.

"It should be kept in mind that the term 'employing unit,' as used in the statute, is broad enough to include individuals and co-partnerships, as well as corporations. In some instances, it may also embrace trustees, personal representatives of estates, and receivers. For an example as to how the act may operate under the state's theory, a corporation with only three employees may be rendered liable for the tax because 51 per cent of its voting stock is owned by a person who also owns a private business with six employees, or two such businesses with three employees each. Thus the corporation, in the case of the illustration, is forced into the situation of a taxpayer, without regard to its competitive relationship to other corporations engaged in the same business and having the same number of employees. Its legal entity, which the law is supposed to respect, is thereby grievously discriminated against. The clause, 'controlled directly or indirectly by the same interests,' must therefore be carefully scrutinized and considered to ascertain its true meaning and significance. There is authority for the proposition that the holders of a majority of the voting stock of a corporation have control thereof, but to control may

> also have a restricted meaning, depending upon the circumstances under which the language is employed. Thus, in City of Chicago v. Dorband (1938), 297 I11. App. 617, 18 N. E. (2d) 107, the word 'control,' as used in an ordinance, was construed as being synonymous with 'ownership.' Regardless of the shades of meaning that may be attributed to the word, we are convinced that in the interpretation of the act before us, control of a corporation must be regarded as something more than that remote control that arises out of the fact that a majority of the holders of its voting stock may dictate who its directors shall be."

It will be observed that, thus far, the Indiana Supreme Court, interpreted Section 2, (g), (4), of the Indiana Unemployment Compensation Act as not being applicable to the facts in this case. Hence, it would appear that the controlling and primary feature of the Indiana Supreme Court's decision was one of statutory construction and interpretation.

True, the Indiana Supreme Court, at the end of its decision, did observe "that the construction and application of the statute sought by the state" would do violence to respondent's constitutional rights, but it did not intimate what constitutional rights would be thus violated. Respondent insists that, by its said decision, the Indiana Supreme Court decided primarily a question indigenous to Indiana statutory law.

Before certiorari will be granted, it must be made to appear affirmatively that not only a federal question was pre-

sented but that its decision was necessary to a determination of the cause. And where the decision rendered rested upon independent or non-federal grounds such as the interpretation of a state statute as applied to the pertinent facts, certiorari will be denied.

New York Central R. Co. v. New York, 186 U. S. 269;
Waters-Pierce Oil Co. v. State of Texas, 212 U. S. 112;
Southern P. Co. v. Schuyler, 227 U. S. 601;
Adams v. Russell, 229 U. S. 353;
Farson v. Bird, 248 U. S. 268;
Petrie v. Nampa, etc., Dist., 248 U. S. 154;
People, ex rel, Doyle v. Atwell, 261 U. S. 590.

Where the decision of the State court rests upon a construction and application of a state law, the Supreme Court of the United States will not pass upon the constitutional questions raised.

Chanler v. Kelsey, 205, U. S. 466, 467;
Moffiitt v. Kelley, 218 U. S. 400;
Nichol v. Cole, 256 U. S. 222, 225;
Chicago, G. W. Ry. Co. v. Kendall, 266 U. S. 94, 97-98;
Bohler v. Callaway, 267 U. S. 479, 489;
Stebbins v. Riley, 268 U. S. 137;
Risty, et al, v. Chicago R. I. & Pac. Ry. Co., 270 U. S. 378, 387;
Missouri, ex rel, v. North, et al, 271 U. S. 40, 41;

Saltonstall v. Saltonstall, Trustee,
276 U. S. 260, 270.

"The decisions of the State courts are followed on the question of what are the laws of the state, * * * their construction," etc.

2 Cyc. of Fed. Proc., Sec. 404, p. 459;
5 Cyc. of Fed. Proc., Sec. 2665, p. 1044;
Town of South Ottawa v. Perkins, 94 U. S. 260;
Stebbins v. Riley, 268 U. S. 137;
Risty v. Chicago R. I. & Pac. Ry. Co.
270 U. S. 378;
United States v. Knott, 298 U. S. 544.

It was not necessary for the Indiana Supreme Court to rule on the constitutionality of the statute under consideration, because by its decision, it had interpreted said statute as not being applicable to the facts involved in this action. Hence, under such circumstances, certiorari will be denied.

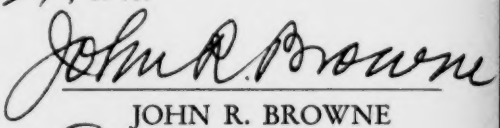
Johnson v. Risk, 137 U. S. 300;
Adams v. Russel, 229 U. S. 353.

Point B

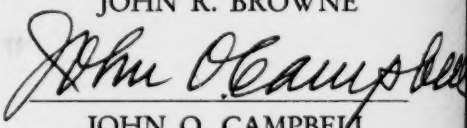
Since a non-federal question was decided by the Indiana Supreme Court, as shown in Point I and in Point A of the Argument hereinbefore set out, petitioner is not entitled to a writ of certiorari on the 2nd and 3rd points set out on pages 8 and 12 of its brief and the argument supporting the same.

It is, therefore, respectfully submitted that this cause is not a proper one for review by certiorari in this court, and that the petition for a writ of certiorari herein should be denied.

Dated February 21, 1941.



JOHN R. BROWNE



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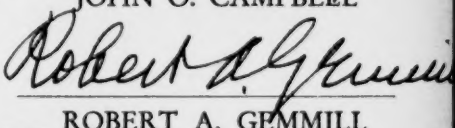

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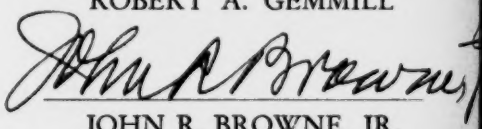

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THE INDIANA UNEMPLOYMENT COMPENSATION BOARD

Petitioner

v.

BENNER-CORYELL LUMBER COMPANY, INCORPORATED

BRIEF FOR UNEMPLOYMENT COMPENSATION COMMISSION OF THE STATE OF NORTH CAROLINA ON THE PETITION FOR A WRIT OF CERTIORARI, SUBMITTED AS A FRIEND OF THE COURT

HARRY MCMULLAN,
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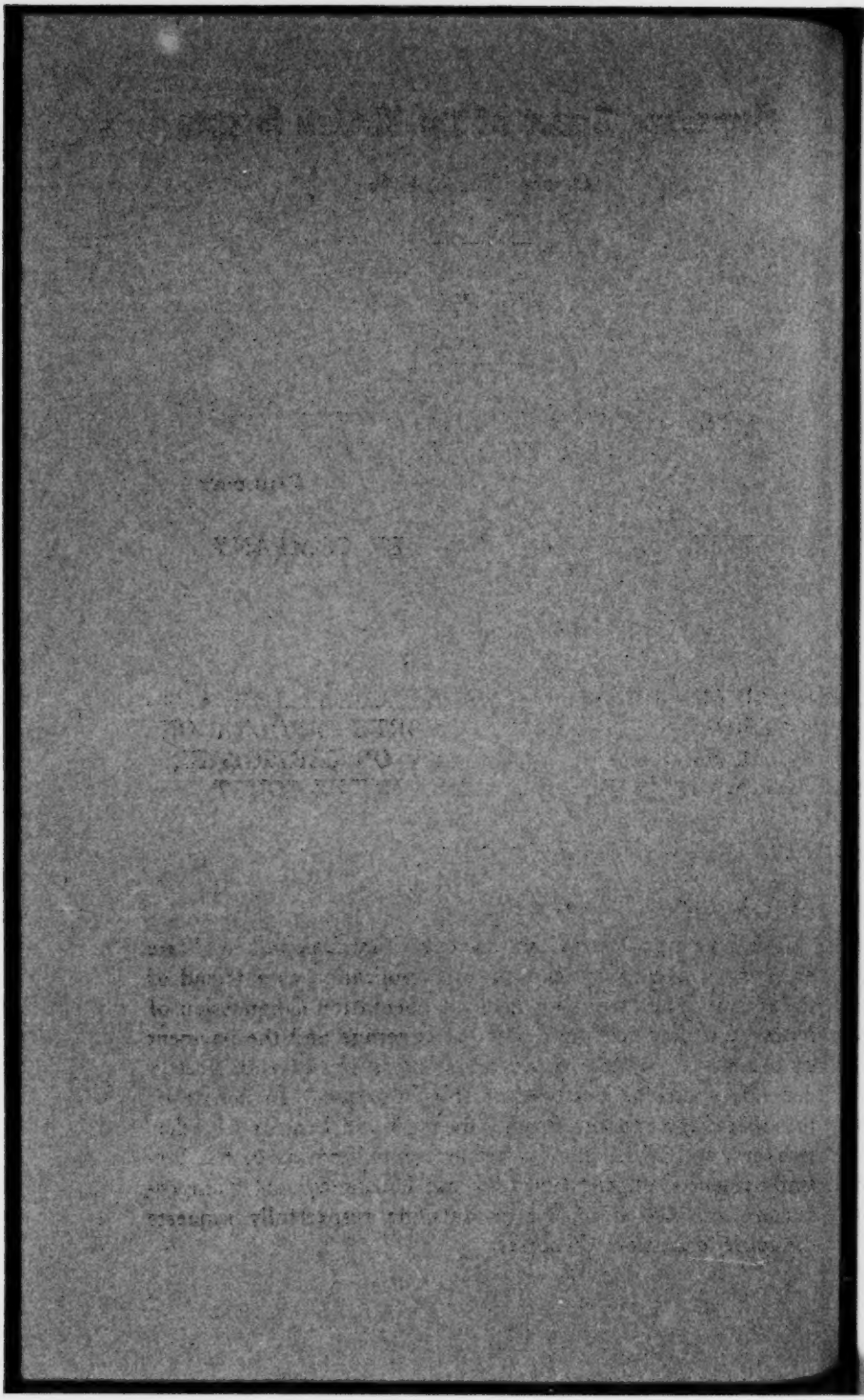

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MAY IT PLEASE THE COURT:

The Unemployment Compensation Commission of the State of North Carolina appears on this application as a friend of the court. The Unemployment Compensation Commission of North Carolina considers that the coverage and the payment of benefits to several thousand workers vitally and directly depends upon the outcome of this litigation. In behalf of these workers and the future coverage and benefits of other workers, and in behalf of a proper administration of the Unemployment Compensation Law the Unemployment Compensation Commission of North Carolina respectfully requests the court to consider this brief.

The Unemployment Compensation Law of North Carolina contains the following section:

> "Employer means:
>
> * * * * * * * * *
>
> "Any employing unit which together with one or more other employing units, is owned or controlled (by legally enforcible means or otherwise) directly or indirectly by the same interests, or which owns or controls one or more other employing units (by legally enforcible means or otherwise), and which, if treated as a single unit with such other employing unit, would be an employer under paragraph (1) of this subsection";

North Carolina, Sec. 19 (f) (4), Public Laws of North Carolina, 1936—Extra Session, ch. 1 (North Carolina Code of 1939 Annotated, Sec. 8052 (19) (f) (4));

The court will observe that this provision of the North Carolina Law is very similar to that of the Indiana Unemployment Compensation Law. In the administration of unemployment compensation laws this and similar provisions are usually referred to as "affiliation" or "common control" provisions or sections.

We approve and endorse the legal positions and authorities presented and relied upon in the petition and brief submitted by the Indiana Unemployment Compensation Board. For this reason we do not again discuss these points but wish to call the court's attention to the importance of this cause with reference to the practical administration of the Unemployment Compensation Law of North Carolina.

The experience of the Unemployment Compensation Commission of North Carolina has demonstrated that the provision in question is an essential and almost indispensable instrument for a practical, fair, and efficient administration of our Act. The ordinary type of employer under the Unemployment Compensation Law of North Carolina is the employing unit that has had in employment eight or more individuals for twenty different weeks in a calendar year. This line of demarcation between liability and nonliability was estab-

lished and this classification was made for the convenience of small business units; this relieving of small business units of unnecessary burden also has resulted in some convenience to the Unemployment Compensation Commission of North Carolina in furnishing forms, solving procedural questions and the general problems of administration. It is, therefore, easy to see that unless our agency is provided with a valid "common control" provision there will be a great tendency for business units now in operation to break down their units into distinct establishments with some feature of affiliation and thus evade the tax; new business units in perfecting their business forms do and will arrange their organizations into separate affiliated establishments for purposes of avoiding the tax.

The Supreme Court of North Carolina early recognized the importance of and gave judicial approval to our "common control" provision in the case of *Unemployment Compensation Commission v. City Ice & Coal Co.* (1939), 216 N. C. 6, 3 S. E. (2d) 290; as a result our agency has provided unemployment benefits for a great number of otherwise ineligible workers; if this provision is invalidated the law can easily be evaded, many workers will lose their protection under the Act and the unemployment compensation system designed to furnish a measure of security against the hazard of unemployment will be sabotaged by ingenious legal improvisations or by astute business technique. Our experience all goes to show that there is much attempted evasion of the unemployment compensation law and our agency has had to rely heavily on this provision.

We further submit that such a provision tends to equalize the competitive situation which would otherwise result where one large scale business broke itself into establishments to avoid the tax as opposed to another large scale business that operated within the law; such a provision guarantees that business units in the same general classification shall be treated alike, and prevents too sharp a classification in terms of the number of individuals employed, that is, eight or more.

Much uncertainty has resulted by reason of the fact that the Supreme Courts of some states have upheld the validity

of "common control" provisions while on the other hand the Supreme Court of Georgia in the case of *Independent Gasoline Company v. Bureau of Unemployment Compensation of Georgia*, __Ga., __ 10 S. E. (2d) 58, cert. den. __ U. S. __, 61 S. Ct. 175, and the Supreme Court of Indiana in the present case have rendered decisions to the effect that "common control" provisions are unconstitutional and invalid. The constitutional validity of such provision is now in serious doubt and employers operating separate establishments under common control are now questioning as to whether they are liable. Some of these have paid taxes and are demanding refund, and some are refusing to pay currently due contributions. The status of covered workers under this provision is in doubt and there are many serious questions as to whether payment of benefits should be continued under such a situation.

This state is, therefore, faced with the enormous problem of litigation upon the question of the constitutionality of the "common control" provision in its own unemployment compensation law. For this reason the State of North Carolina has filed this statement and respectfully requests this Court to take jurisdiction and grant the petition of the Indiana agency to the end that an authoritative decision may be given concerning the constitutionality of the "common control" provision and to the end that the Unemployment Compensation agencies of the nation may proceed with their administrative functions unimpeded and unhindered by litigation on this question.

HARRY MCMULLAN,
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ADRIAN J. NEWTON,
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THOS. J. MORAN'S SONS
BATON ROUGE

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May It Please the Court:

The Administrator of the Division of Employment Security of the Department of Labor of the State of Louisiana, through the Attorney General of Louisiana appears herein as a friend of the Court because of the doubt

which has been cast upon the validity of an important provision of the Louisiana Unemployment Compensation Law *(Section 18 (f) (4) of Act 97 of 1936, as amended by Act 164 of 1938, Act 16 of the First Extraordinary Session of 1940 and Act 11 of the Regular Session of 1940)* by the decision of the Supreme Court of the State of Indiana declaring unconstitutional a similar provision of the Indiana law.

The section of the Louisiana Statute above referred to reads as follows:

> "Any employing unit which, together with one or more other employing units, is owned or controlled (by legally enforceable means or otherwise) directly or indirectly by the same interest, or which owns or controls (by legally enforceable means or otherwise) one or more other employing units, and which if treated as though a single unit with such other employing units or interest, or both, would be an employer under paragraph (1) of this subsection;"

The Louisiana Unemployment Compensation Law, is designed to relieve small business concerns of the burden of taxation in aid of the unemployed; *Section 18 (f)(4)* commonly known as the *"common control"* provision of the Act prevents larger concerns, well able to pay the tax and intended to be reached by the statute, from evading

the payment of this beneficent tax by a division of establishments.

That the provision is fair and equitable, certainly cannot be denied. It sees that the burden of taxation is placed on those able to pay; it treats alike all businesses in the same general classification, and it avoids the unfair situation of large business concerns being treated differently because one may devise some feasible plan to divide its establishments while the other may not find it feasible to do so.

Litigation is now pending in the courts of Louisiana involving the *"common control"* provision of our statute and the decision of the Indiana Supreme Court and a similar decision of the Georgia Supreme Court in the case of *Independent Gasoline Company,* vs. *Bureau of Unemployment Compensation of Georgia, 10 S. E. (2d) 58,* certiorari denied, *61 S. Ct. 175,* will induce much additional litigation and create a serious problem of enforcement in this State.

Under the circumstances, it is the hope of the department charged with the administration of the Louisiana Unemployment Compensation Law that the Court will take jurisdiction of the Indiana case so that an authorita-

tive decision may be rendered concerning the constitutionality of the provision of the law in question and thus permit Louisiana's program of unemployment compensation to be carried out unimpeded by dilatory litigation.

Respectfully submitted,

EUGENE STANLEY,
Attorney General of
the State of Louisiana.